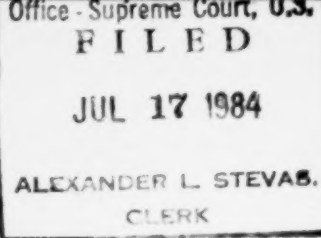


84-144



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

COASTAL GEORGIA AUDUBON SOCIETY,

Petitioner,

v.

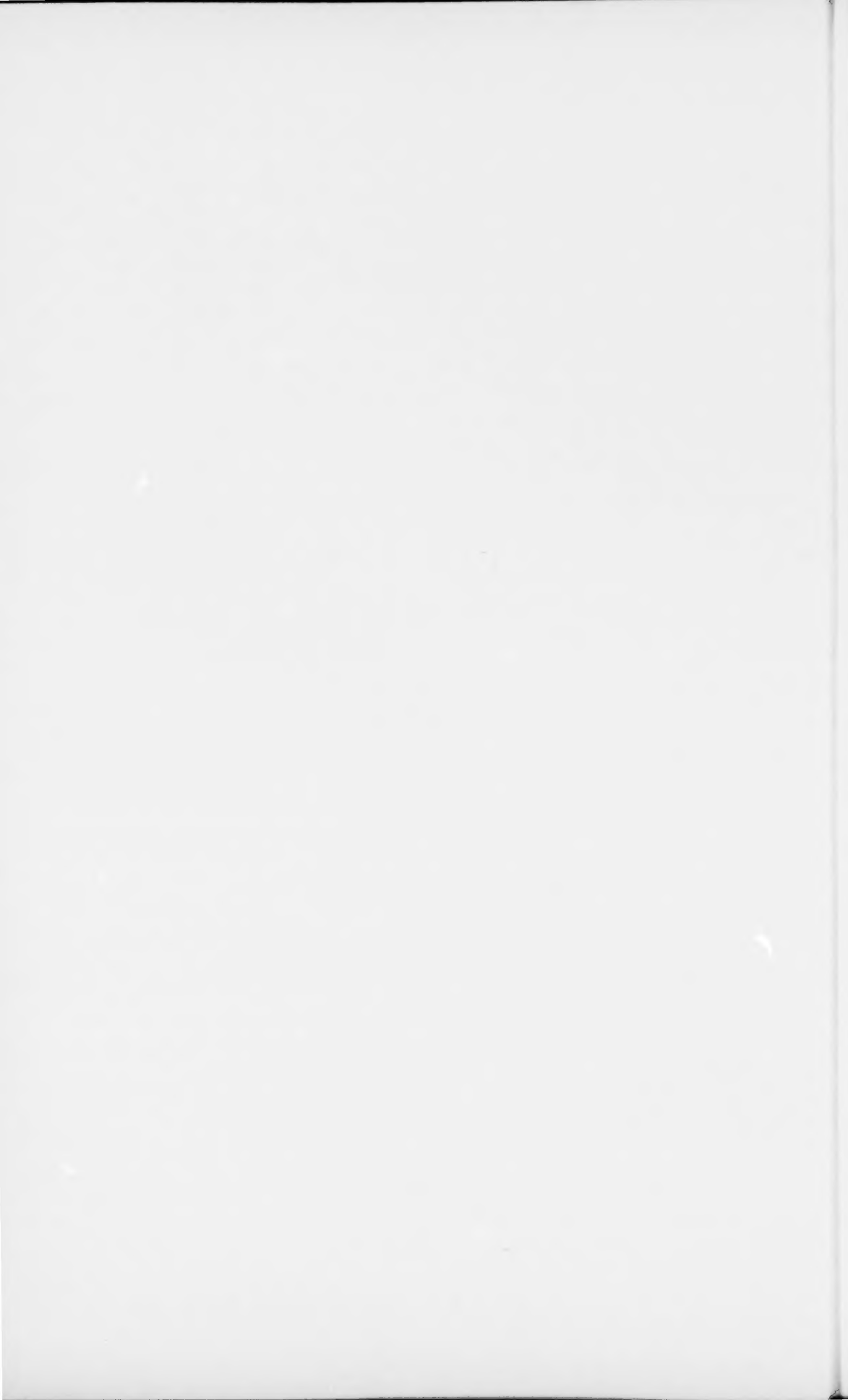
MIKE P. STURDIVANT, EARLE F. JONES and SHORE
ASSISTANCE COMMITTEE of the DEPARTMENT OF
NATURAL RESOURCES of the STATE OF GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

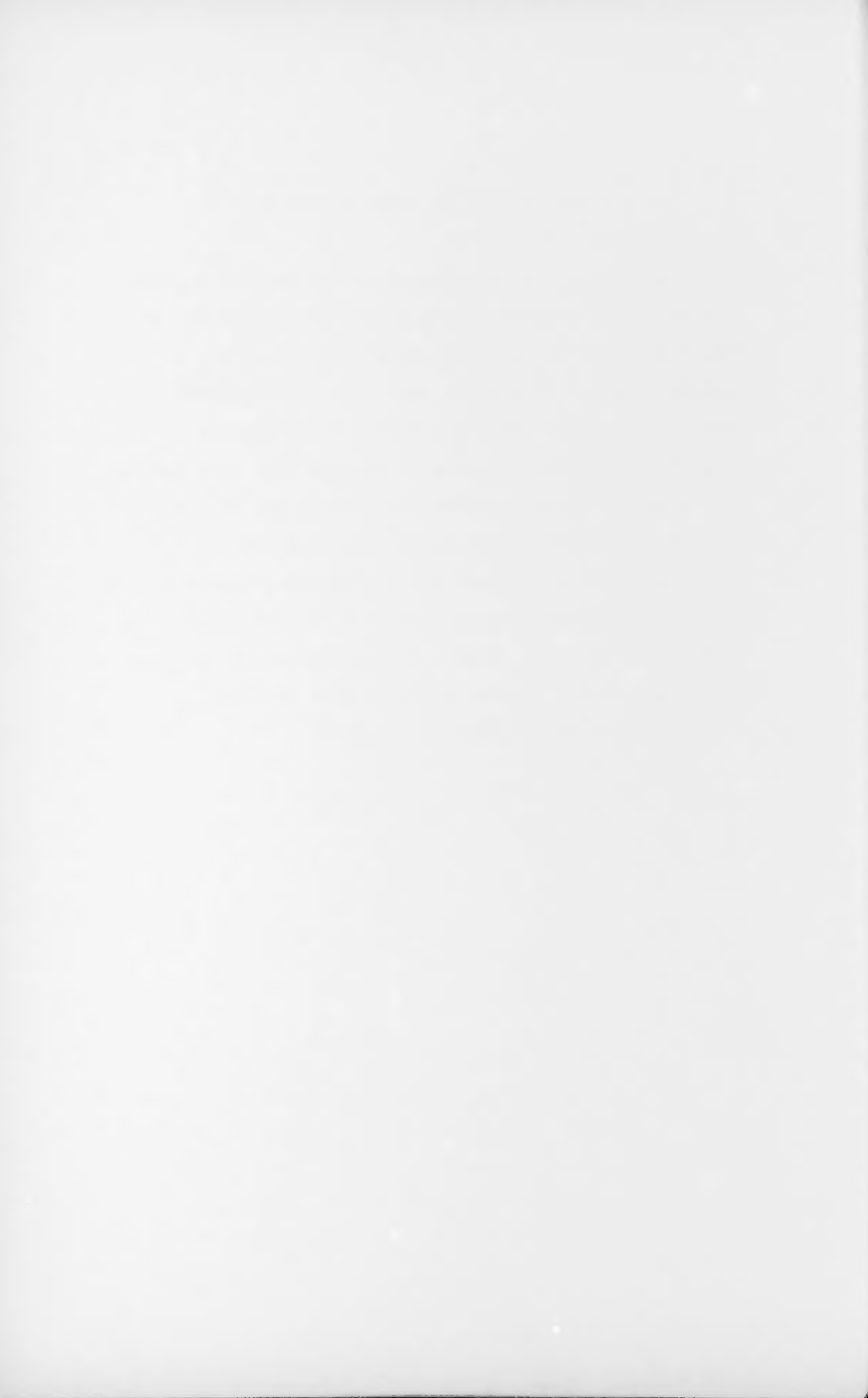
MORETON ROLLESTON, JP.
2604 First National Bank Twr.
Atlanta, Georgia 30383
(404) 658-1228

Attorney for Petitioner



QUESTIONS PRESENTED FOR REVIEW

Where the Georgia Legislature has by statute conferred upon Audubon the RIGHT to appeal to the Supreme Court of Georgia under the Georgia Administrative Procedure Act, can the Supreme Court of Georgia deny the right of appeal by requiring Audubon to file a request for permission to appeal, thereby converting the right of appeal to a discretionary permission to appeal; or in the alternative is such action by the Supreme Court of Georgia in violation of due process guaranteed by the Georgia Constitution as well as the Fifth and Fourteenth Amendments to the Constitution of the United States?



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

COASTAL GEORGIA AUDUBON SOCIETY,

Petitioner,

v.

MIKE P. STURDIVANT, EARLE F.
JONES and SHORE ASSISTANCE
COMMITTEE of the DEPARTMENT OF
NATURAL RESOURCES of the STATE
OF GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

Petitioner, Coastal Georgia Audubon Society,
respectfully prays that a writ of certiorari issue
to review the judgment of the Supreme Court of
Georgia entered in this case on April 18, 1984.



OPINION BELOW

The opinion of the Supreme Court of Georgia has not been reported. The entire opinion reads as follows:

"It appearing that the appellant failed to file an application for discretionary appeal as required by OCGA §5-6-35, it is ordered that this appeal be hereby dismissed."

JURISDICTION

The opinion of the Supreme Court of Georgia was issued and entered on April 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTES INVOLVED

The Official Code of Georgia Annotated, Section 50-13-20 provides as follows:

"An aggrieved party may obtain a review of any final judgment of the superior court under this chapter by the Court of Appeals or the Supreme Court, as provided by law."



Under O.C.G.A. 5-6-35 (f), the Supreme Court may deny an appeal from a state administrative agency.

STATEMENT OF THE CASE

The Georgia Department of Natural Resources granted a permit to a developer to build 47 condominium units on the beach at St. Simons Island, Georgia in an area which even the staff of the Department of Natural Resources described as "high risk, unstable, unpredictable, mobile and fragile environment". The land upon which the condominiums were permitted was under the ocean just a few years ago and is now accreted land.

Audubon appealed the decision granting the permit to build the condominiums as provided under Georgia law. The last appeal was from Glynn Superior Court to the Supreme Court of Georgia. Said Supreme Court ruled that Audubon did not have the right to appeal, but only had the right to request permission which could be withheld.

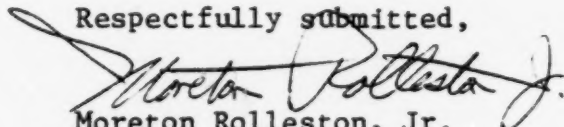
We contend that the opinion of the Supreme Court of Georgia violates the rights of due process of Audubon.



The substantive question involved will establish the rules by which construction may be accomplished on all the beaches of Georgia. It is important to Audubon and to all the citizens of the State of Georgia that such construction rules and directives for the use of the beach be reviewed by this Court.

We urge the Court to grant this writ of certiorari and to afford Audubon the opportunity to argue by brief and orally this case in detail.

Respectfully submitted,



Moreton Rolleston, Jr.
Attorney for Petitioner

2604 First National Bank Tower
Atlanta, Georgia 30383
404/ 658-1228

APPENDIX

APPENDIX A

OPINION OF THE SUPREME COURT OF GEORGIA

COASTAL GEORGIA AUDUBON SOCIETY

v.

MIKE P. STURDIVANT, EARLE F. JONES
AND SHORE ASSISTANCE COMMITTEE OF
THE DEPARTMENT OF NATURAL RESOURCES
OF THE STATE OF GEORGIA

Opinion filed April 18, 1984,
Not Reported at this time.

"It appearing that the appellant failed to file an application for discretionary appeal as required by OCGA §5-6-35, it is ordered that this appeal be hereby dismissed."



APPENDIX B

IN THE SUPERIOR COURT FOR GLYNN COUNTY
STATE OF GEORGIA

COASTAL GEORGIA AUDUBON SOCIETY,
Appellant

v.

MIKE P. STURDIVANT, EARLE F.
JONES, and SHORE ASSISTANCE
COMMITTEE OF THE DEPARTMENT OF
NATURAL RESOURCES OF THE STATE
OF GEORGIA,

Appellees.

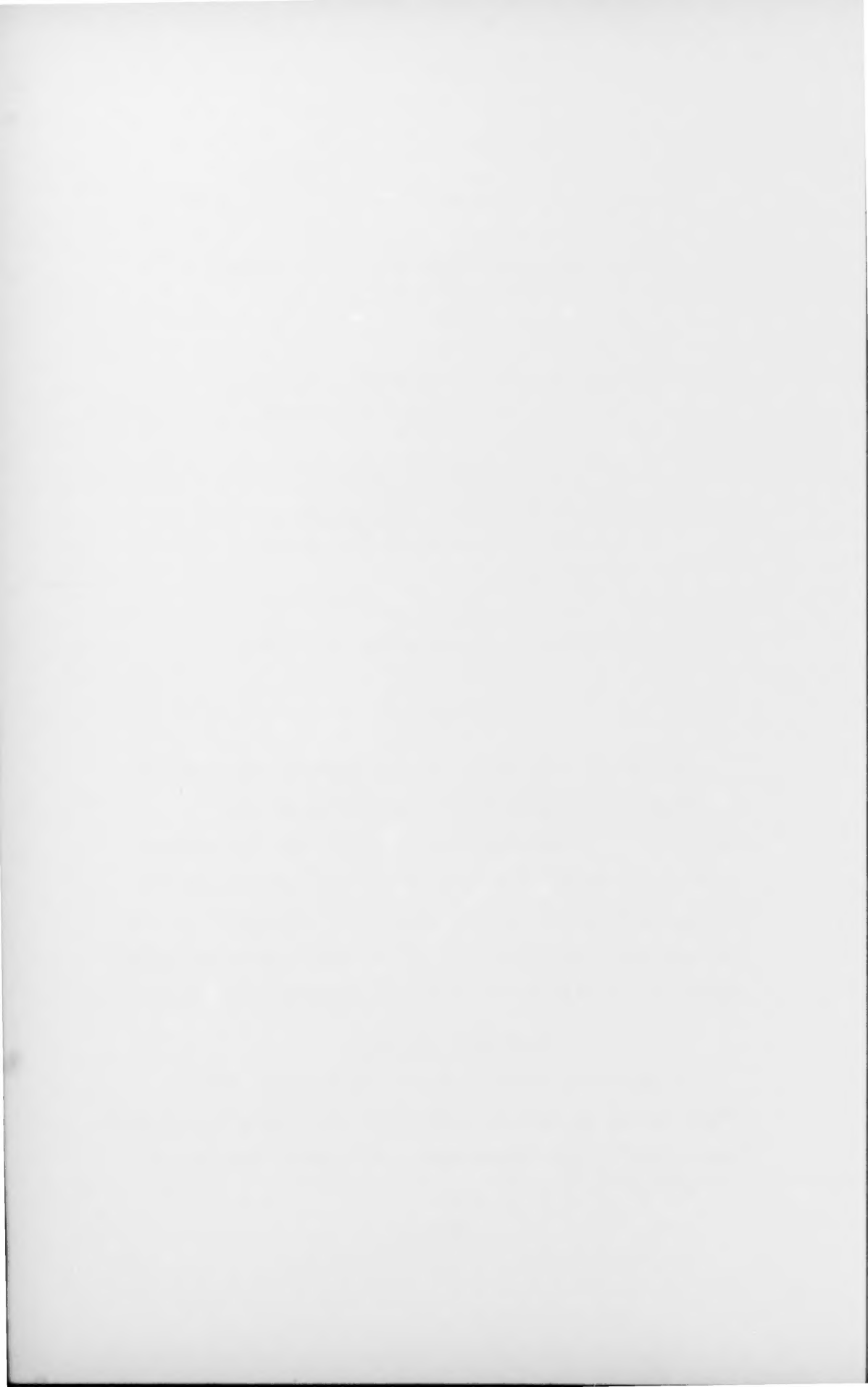
Opinion filed December 22, 1983

ORDER

The above captioned matter having come before the Court on appeal from a decision of the Administrative Review Committee of the Department of Natural Resources, and after due consideration of the record and of the arguments advanced at the hearing held November 23, 1983, the Court herewith makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

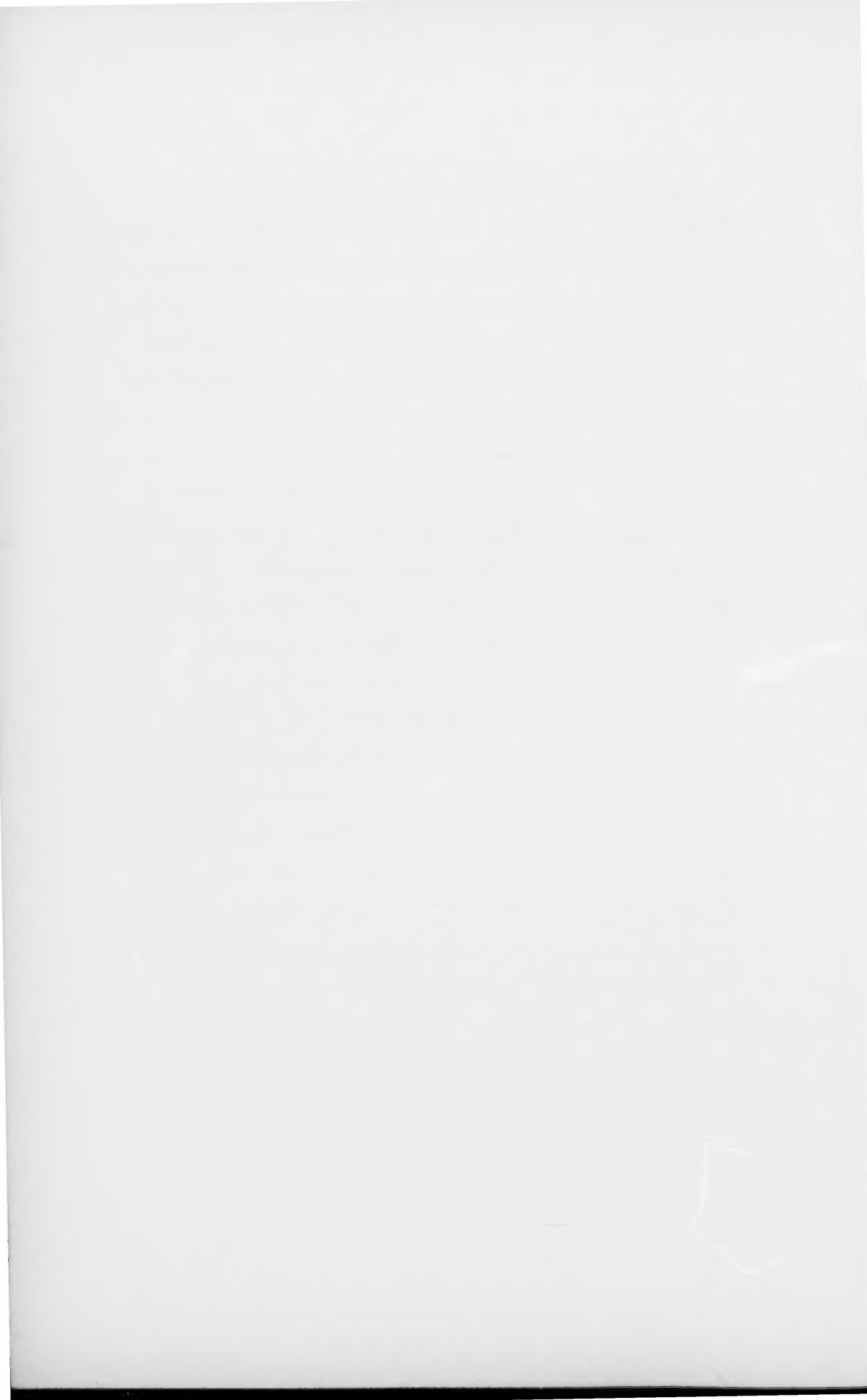
On April 5, 1982, Messrs. Sturdivant and Jones filed an application with the Shore Assistance Committee of the Department of Natural Resources



of the State of Georgia for a permit to build condominiums on land located on St. Simons' Island, Georgia. Jones and Sturdivant were named therein as the Applicants. Richard Tucker was designated as the 'Applicant's authorized agent for permit application coordination.' Mr. Tucker signed the application in the space provided for the Applicant's signature.

On May 11, 1982, Permit No. 74 was issued by the Shore Assistance Committee for the construction of the proposed condominiums. Appellant filed an appeal with the Board of Natural Resources who appointed James B. Talley, Executive Assistant to the Commissioner of the DNR, as Hearing Officer. On June 8, 1983, Hearing Officer Talley issued his Initial Decision upholding the issuance of Permit No. 74. Appellant then filed a Petition for Review of Hearing Officer Talley's decision with the Administrative Review Committee of the DNR. On August 4, 1983, the Administrative Review Committee affirmed the decision of Hearing Officer Talley, whereupon Appellant has appealed that decision to this Court pursuant to O.C.G.A. Section 50-13-19. Appellant enumerates as error:

1. That Hearing Officer Talley should have recused himself upon Appellant's properly made Motion to Disqualify;



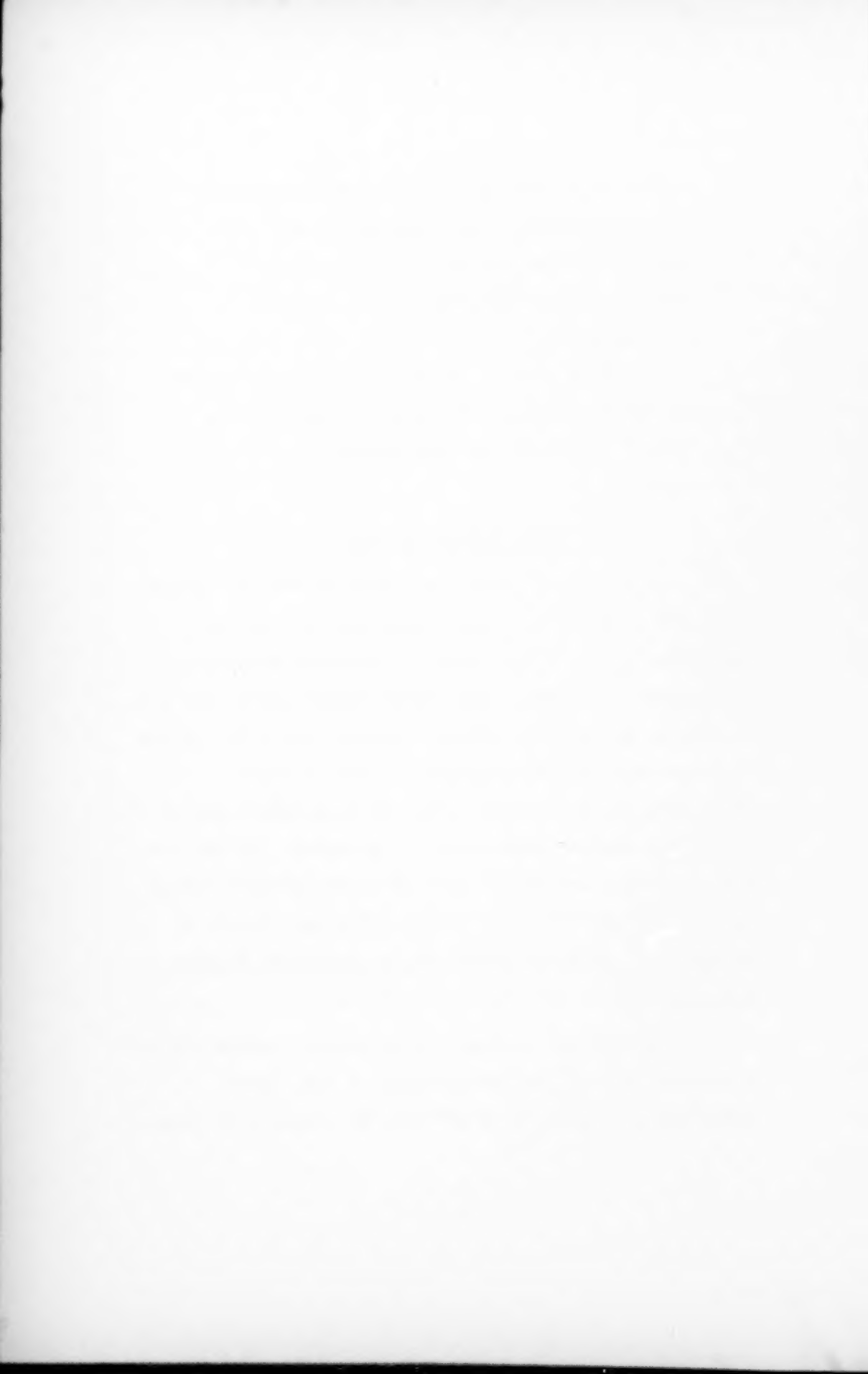
2. That the application by Appellees to the Committee was improperly and unlawfully filed and that, as a result, the permit issued thereon is without effect; and,

3. That the decision of Hearing Officer Talley upholding the permits issuance is contrary to law and the weight of the evidence.

CONCLUSIONS OF LAW

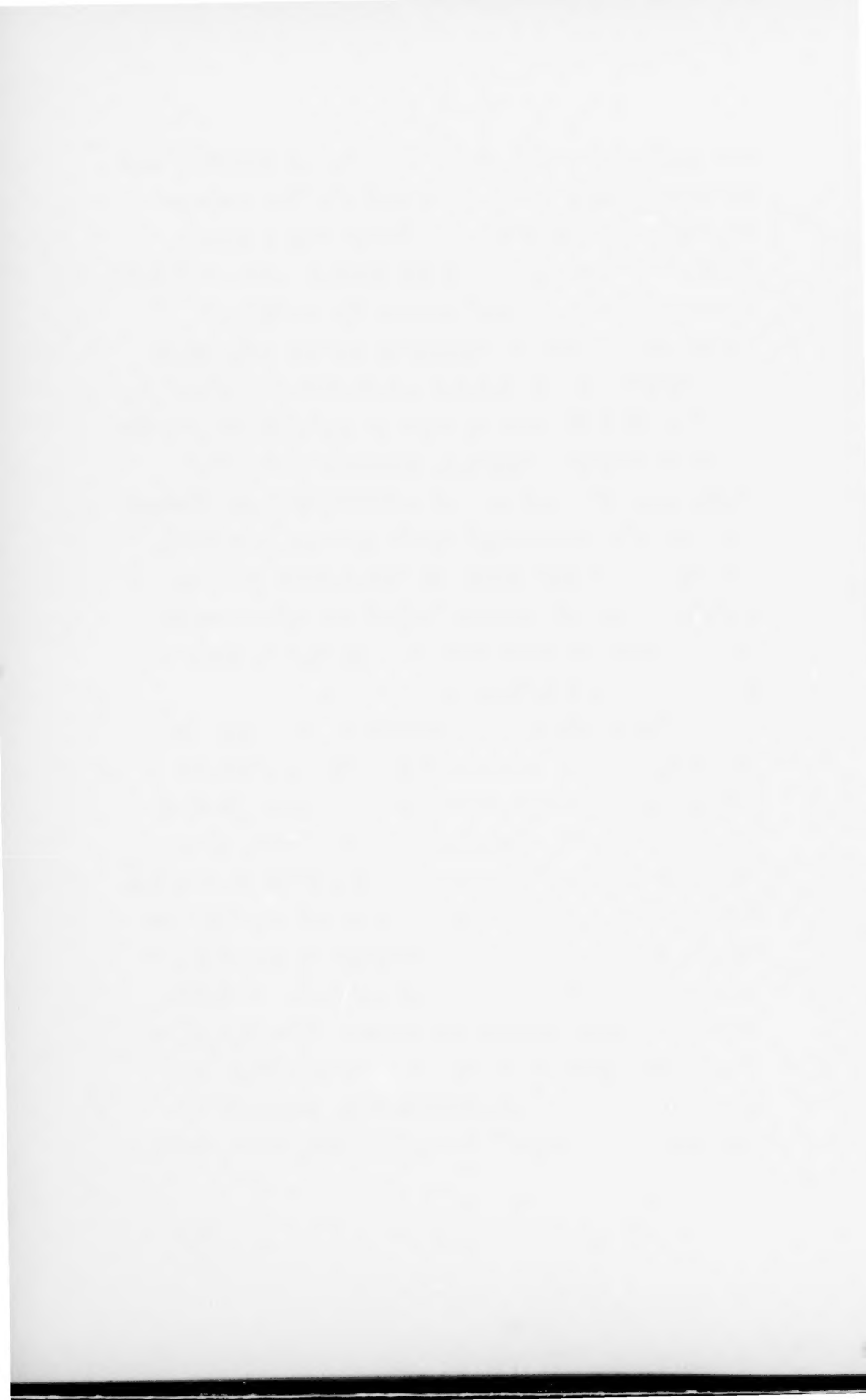
1. Appellant's Motion to Disqualify was based upon the contention that James Talley, as an Employee of the Department of Natural Resources, could not act freely and impartially under the law inasmuch as Hearing Officer Talley would be called upon to review the decision of his alleged superior Joe D. Tanner, who was also Chairman of the Shore Assistance Committee. However, the Motion was properly denied by said hearing officer based on the decision of the Georgia Supreme Court in Department of Transportation v. Del-Cook Timber Company, Inc., 248 Ga. 734 (1982).

2. Appellant contends the verbal authorization given by one of the Permittees to the Shore Assistance Committee staff for Mr. Tucker to sign



the application for the Permittees (T.282-287) was an insufficient grant of agency for the purpose of signing said application. Though the Court is mindful of the Agent's equal dignity rule, O.C.G.A. Section 10-6-2, an application for a Shore Assistance Committee permit is not an instrument falling within the Statute of Frauds, O.C.G.A., Section 13-5-30, nor is such an application required to be signed. O.C.G.A. Section 12-5-127. Therefore, as noted on the application, Mr. Tucker was the duly authorized agent for the Permittee and the Permittees were the applicants for the permit. That Mr. Tucker signed the application in the space provided for the applicants comports with the aforementioned grant of agency.

3. Here the Society contends: (A) That the Shore Assistance Act prohibits the building of any structure on the sand dunes or other fragile sand area in the sand-sharing system and, alternatively (B) that the initial decision of Hearing Officer Talley is contrary to law and against the weight of the evidence. Inasmuch as O.C.G.A. Section 12-5-238 (c) provides minimum standards for development within the dynamic dune field, it cannot be argued that the General Assembly, in enacting the Shore Assistance Act, intended to prohibit all construction within that area. Under



Code Section 50-13-19, the Court is bound by the decision of the Department of Natural Resources if said decision is substantiated by any evidence on the record. After consideration of the entire record, the Court finds the DNR's decision to be amply supported.

ACCORDINGLY, the Decision of the Department of Natural Resources is affirmed in all respects.

SO ORDERED, this the 21st day of December, 1983.

A. BLENN TAYLOR, JR.,
JUDGE, SUPERIOR COURTS
BRUNSWICK JUDICIAL CIRCUIT



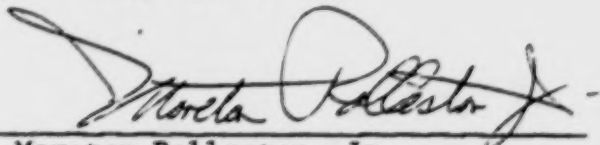
CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing "Petition for a Writ of Certiorari to the Supreme Court of Georgia" upon counsel for all parties by placing copies in the United States Mail, postage prepaid, properly addressed, as follows:

Mrs. Patricia Barmeyer
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Mr. Tom Lee
P.O. Box 1394
Brunswick, Georgia 31520

This 25th day of July, 1984.


Moreton Rolleston, Jr.

2
NO. 84-144

Office - Supreme Court, U.S.
FILED

AUG 20 1984

WILLIAM L. STEVENS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

COASTAL GEORGIA AUDUBON SOCIETY,
Petitioner,

v.

MIKE P. STURDIVANT, EARLE F. JONES and
SHORE ASSISTANCE COMMITTEE of the
DEPARTMENT OF NATURAL RESOURCES
of the STATE OF GEORGIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION BY THE RESPONDENTS

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Counsel of Record for Shore
Assistance Committee of the
Department of Natural Resources
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MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

ROBERT S. BOMAR
Senior Assistant Attorney General

15 pr

QUESTION PRESENTED

Whether the Supreme Court of Georgia correctly dismissed Petitioner's appeal from the decision of the Superior Court of Glynn County on the grounds that Petitioner had not filed an application for discretionary appeal as required by Georgia law.

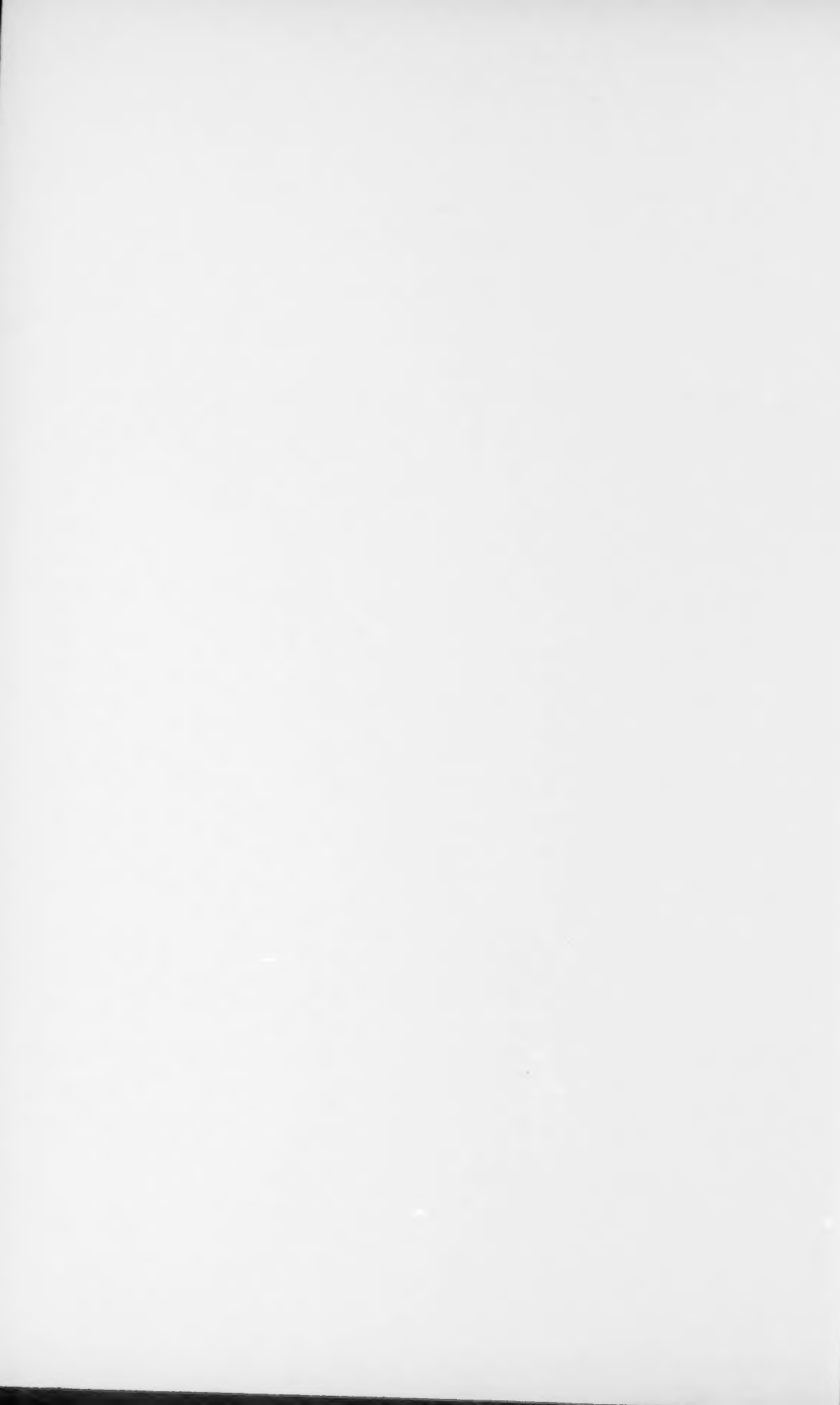


TABLE OF CONTENTS

	<u>Page(s)</u>
QUESTION PRESENTED.	i
REASONS FOR DENYING THE WRIT.	2
A. THE SUPREME COURT OF GEORGIA CORRECTLY DISMISSED PETITIONER'S APPEAL FROM THE DECISION OF THE SUPERIOR COURT BASED ON PETITIONER'S FAILURE TO FILE THE APPLICATION FOR DISCRETIONARY APPEAL REQUIRED BY O.C.G.A. § 5-6-35	2
B. A STATE LEGISLATURE MAY, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMEND- MENT TO THE UNITED STATES CON- STITUTION, FORMULATE APPELLATE PROCEDURE AND PROVIDE FOR A DISCRETIONARY APPEAL FROM LOWER COURT REVIEW OF THE DECISIONS OF ADMINISTRATIVE AGENCIES	4

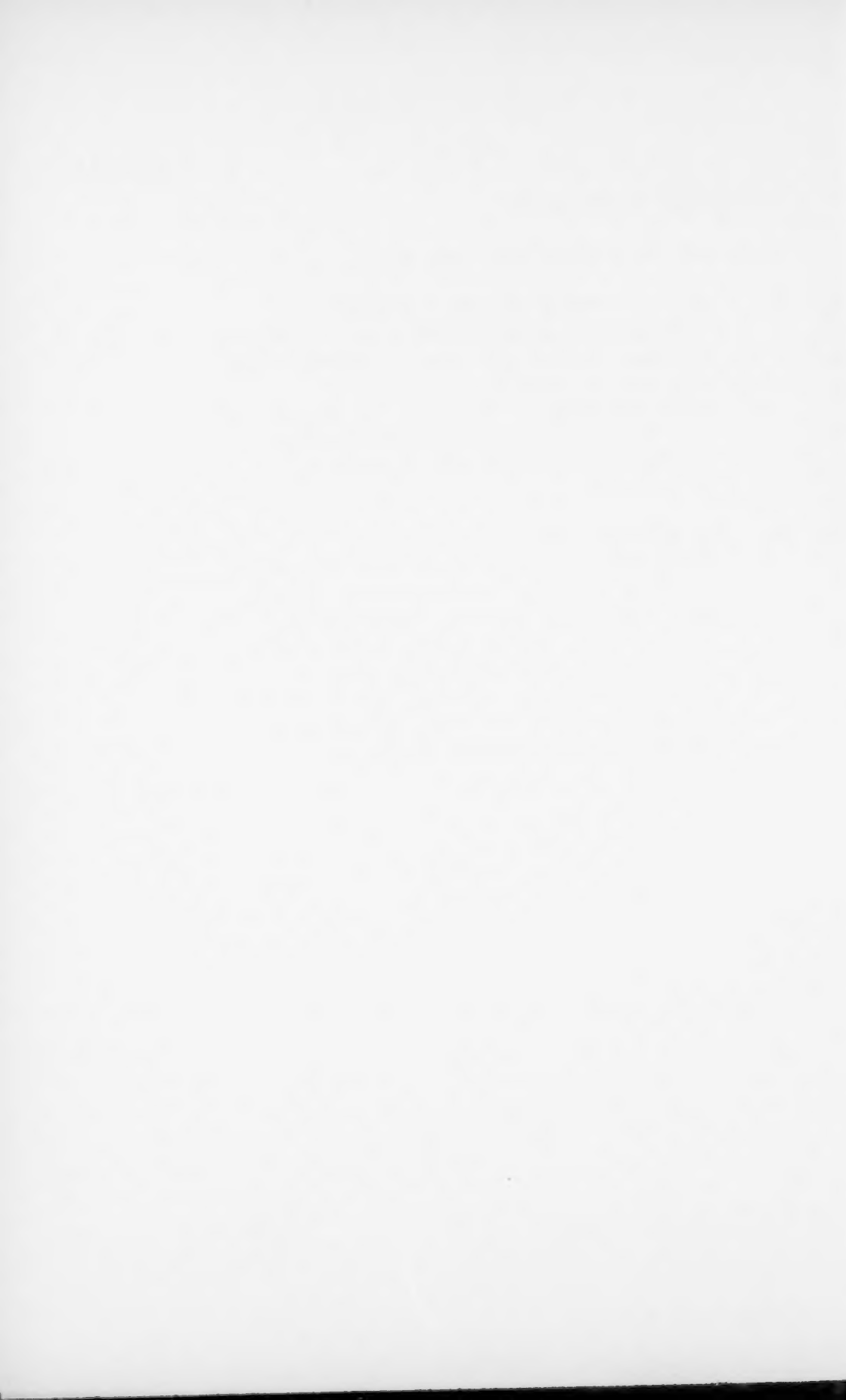


TABLE OF AUTHORITIES

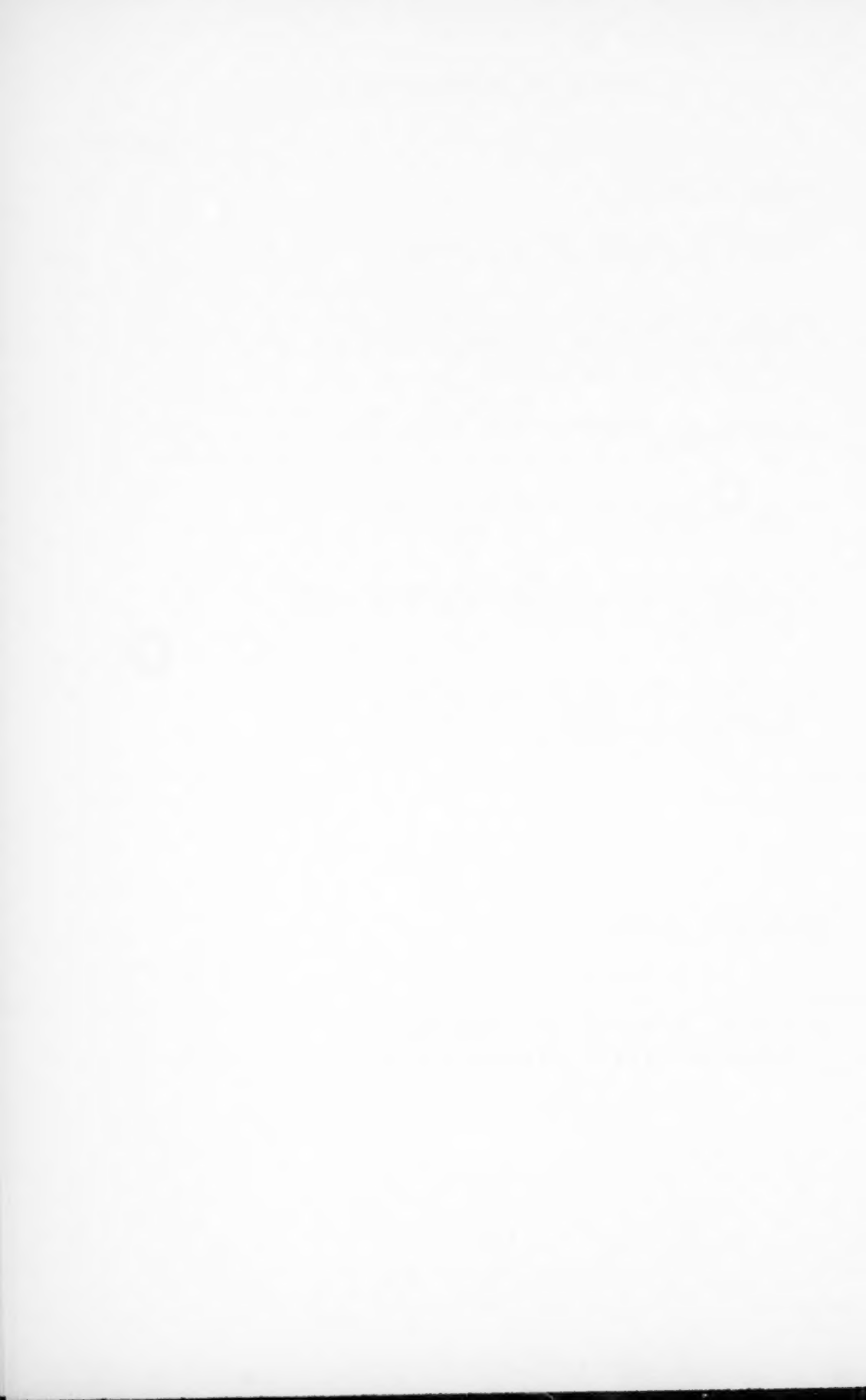
Page(s)

Cases cited:

<u>Carter v. State of Illinois</u> , 329 U.S. 173, 175 (1946)	4
<u>Hogan v. Taylor County Board of Education</u> , 157 Ga. App. 680, 278 S.E.2d 106 (1981)	4
<u>Lindsey v. Normet</u> , 405 U.S. 56, 77 (1972)	4
<u>Lott v. Pittman</u> , 243 U.S. 588, 591 (1916)	5
<u>National Union of Marine Cooks and Stewards v. Arnold</u> , 348 U.S. 37, 43 (1954)	4
<u>Tri-State Building and Supply Company v. Reid</u> , 251 Ga. 38, 302 S.E.2d 566 (1983)	6

Statutes cited:

O.C.G.A. § 5-6-35	2,3,5
O.C.G.A. § 50-13-20, The Georgia Administrative Procedure Act.	2, 3



NO. 84-144

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

COASTAL GEORGIA AUDUBON SOCIETY,

Petitioner,

v.

MIKE P. STURDIVANT, EARLE F. JONES
and SHORE ASSISTANCE COMMITTEE
OF THE DEPARTMENT OF NATURAL RESOURCES
OF THE STATE OF GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION BY THE RESPONDENTS

The Respondents Mike P. Sturdivant, Earle F. Jones and the Shore Assistance Committee of the Department of Natural Resources of the State of Georgia (hereinafter collectively referred to as the "Respondents") urge the Supreme Court to deny the Petition for a Writ of Certiorari to review the opinion of the Supreme Court of Georgia entered in the above case on

April 18, 1984. The decision of the Supreme Court of Georgia is clearly correct, in conformity with the laws of Georgia and is not a violation of Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

- A. THE SUPREME COURT OF GEORGIA CORRECTLY DISMISSED PETITIONER'S APPEAL FROM THE DECISION OF THE SUPERIOR COURT BASED ON PETITIONER'S FAILURE TO FILE THE APPLICATION FOR DISCRETIONARY APPEAL REQUIRED BY O.C.G.A. § 5-6-35.
-

It is Petitioner's contention that because the Legislature of the State of Georgia has conferred a "right" of appeal from the superior court review of an administrative decision that the Supreme Court of Georgia may not deny the "right" of appeal by requiring Petitioner to apply for an order allowing such an appeal. A reading of O.C.G.A. §§ 50-13-20 and 5-6-35 shows, however, that the legislature has not granted an unrestricted right of appeal,

and that it was a statutory, not judicial, requirement that Petitioner file a request for an order allowing appeal to the Supreme Court of Georgia.

The statute provides:

"An aggrieved party may obtain a review of any final judgment of the superior court under this chapter [Administrative Procedure] by the Court of Appeals or the Supreme Court, as provided by law" (emphasis supplied).

O.C.G.A. § 50-13-20.

O.C.G.A. § 5-6-35 provides that an appeal from a decision of a superior court reviewing the decision of an administrative agency is made by filing a request for an order granting an appeal. The language at this section is mandatory. Thus, it was not the supreme court which required that a request for discretionary appeal be filed; this was a clear and unambiguous statutory requirement, and the court had no jurisdiction to hear the appeal unless such

an application was made and granted. The dismissal of Petitioner's appeal by the Supreme Court of Georgia was clearly in conformity with the laws of Georgia. See, e.g., Hogan v. Taylor County Board of Education, 157 Ga. App. 680, 278 S.E.2d 106 (1981). As a result, the Petition should be granted only if it appears that Georgia's statutory law has infringed Petitioner's constitutional rights.

B. A STATE LEGISLATURE MAY, CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, FORMULATE APPELLATE PROCEDURE AND PROVIDE FOR A DISCRETIONARY APPEAL FROM LOWER COURT REVIEW OF THE DECISIONS OF ADMINISTRATIVE AGENCIES.

The right of appeal is not essential to due process. Lindsey v. Normet, 405 U.S. 56, 77 (1972); National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 43 (1954). Furthermore, a state may formulate the procedure and conditions of appeal. Carter v. State of Illinois,

329 U.S. 173, 175 (1946); Lott v. Pittman, 243 U.S. 588, 591 (1916). If the state legislature may create or deny the right to an appeal, and may formulate appellate procedure, it is clear that Petitioner's due process rights were not infringed simply because the Supreme Court of Georgia adhered to statutory requirements and dismissed Petitioner's case.

The decision of the superior court was itself a review of the decision of the Administrative Review Committee of the Department of Natural Resources. Petitioner is in effect contending that due process requires an unrestricted right to an appeal from another appellate proceeding. Such a conclusion is not warranted by either authority or common sense. The state has an interest in allocating its judicial resources, and one of the purposes of the discretionary appeal statute (O.C.G.A. § 5-6-35) was to expedite appellate court review of superior court decisions reviewing rulings of administrative agencies without having to issue an opinion in every

such case. Tri-State Building & Supply, Inc. v. Reid, 251 Ga. 38, 302 S.E.2d 566 (1983). Petitioner has already been afforded an evidentiary hearing and a judicial review of that hearing. Certainly Petitioner's right to due process of law is not violated if he is not granted the right to an additional direct appeal. Petitioner had the statutory right to petition for a discretionary appeal and failed to exercise it.

The Petition for Certiorari raises no viable constitutional concerns, and Respondents respectfully request that Petition for Certiorari in this case be denied.

Respectfully submitted,

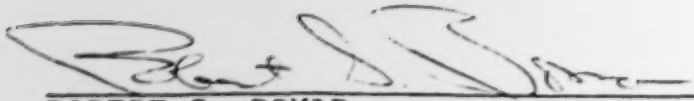
MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

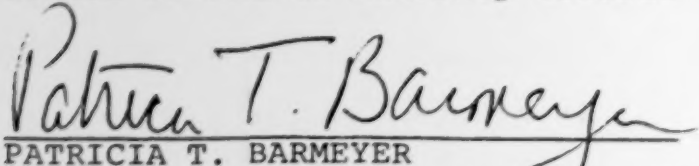
H. PERRY MICHAEL
First Assistant
Attorney General

(Signatures continued next page)

(Signatures continued from
previous page)



ROBERT S. BOMAR
Senior Assistant Attorney General



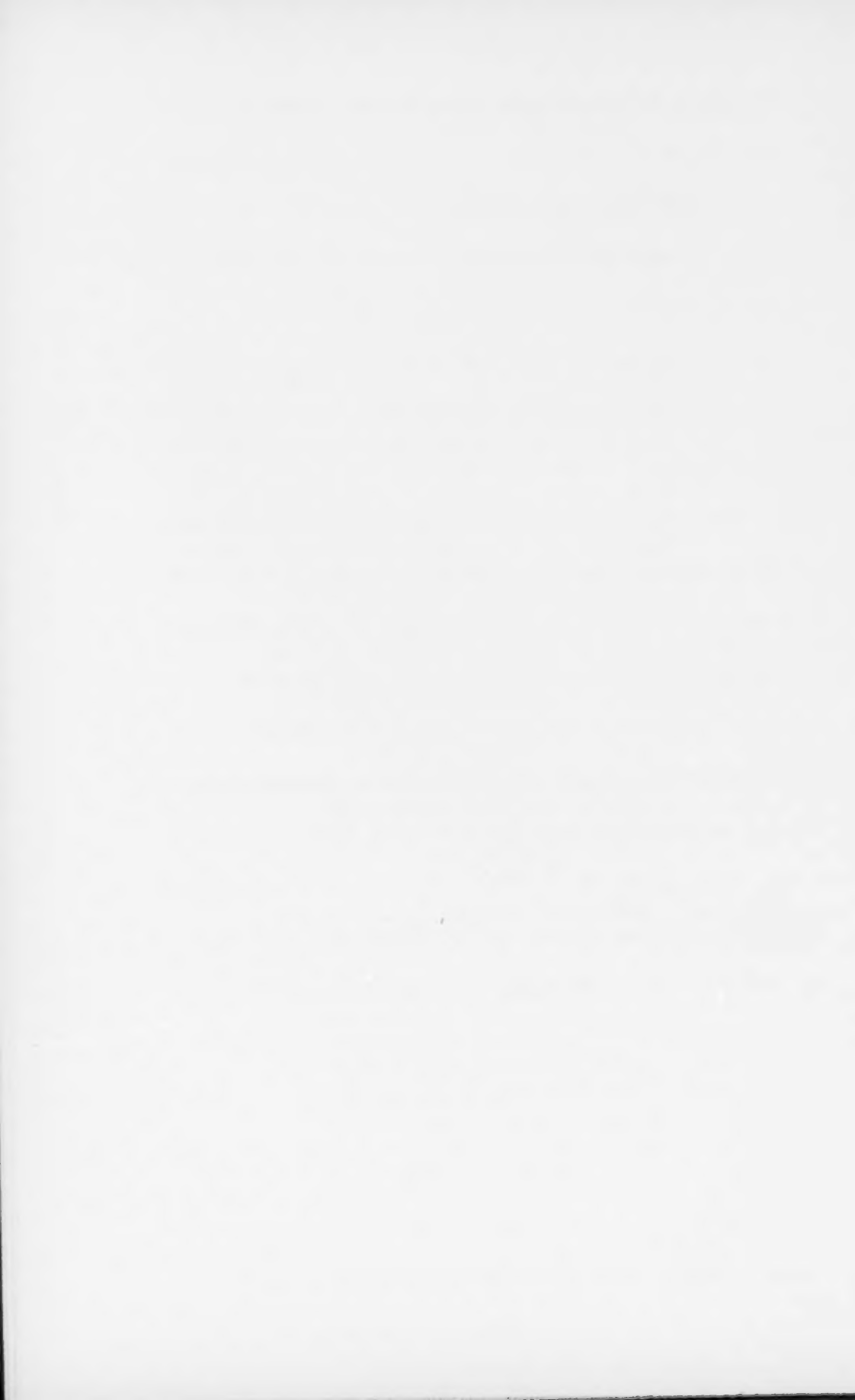
PATRICIA T. BARMEYER
Senior Assistant Attorney General

Counsel of Record for Respondent
Shore Assistance Committee of the
Department of Natural Resources
of the State of Georgia

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THOMAS J. LEE
Counsel of Record for Respondents
Mike P. Sturdivant and
Earl F. Jones

P. O. Box 1394
Brunswick, Georgia 31521
(912) 264-2390



CERTIFICATE OF SERVICE AND MAILING

I, PATRICIA T. BARMEYER, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent Shore Assistance Committee of the Department of Natural Resources of the State of Georgia, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition by the Respondents upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

MORETON ROLLESTON, JR.
2604 First National Bank Tower
Atlanta, Georgia 30383

I further certify and affirm that in accordance with the rules of the Supreme Court of the United States, I have this day mailed forty (40) copies of this

Brief in Opposition by the Respondents to
the Clerk of the U. S. Supreme Court with
proper address and adequate postage, as
follows:

Clerk, U. S. Supreme Court
1 First Street, N. E.
Washington, D. C. 20543

This 16TH day of August, 1984.

Patricia T. Barmeyer
PATRICIA T. BARMAYER
Senior Assistant Attorney General

Sworn to and subscribed
before me this 16TH day
of August, 1984.

Betty L. Stephens
NOTARY PUBLIC

Notary Public, Georgia State at Large
My Commission Expires Nov. 29, 1986

MY COMMISSION EXPIRES: _____

Notary
My Comm